SIME ENGINEERING SDN BHD & ANOR

v.

PUBLIC BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[ORIGINATING SUMMONS NO: D1-24-122-2003]
12 DECEMBER 2003

BANKING: *Banks and banking business - Bankers guarantee - Demand for payment - Absence of fraud - Whether bank bound to pay on guarantee promptly*

BANKING: *Securities for advances - Guarantee given by bank - Demand for payment - Absence of fraud - Whether bank bound to pay on guarantee promptly*

DAMAGES: *Action for - Exemplary damages - No malice, insolence, arrogance or intention to make a profit at plaintiff's expense - Presence of mitigating circumstances - Whether defendant should be punishment by award of exemplary damages to plaintiff*

The plaintiffs appointed one Miya Engineering (M) Sdn Bhd ('Miya') as sub-contractor to undertake certain mechanical works for a project. Pursuant to the terms of the sub-contract, Miya furnished a bankers guarantee for due performance of the sub-contract. Miya contravened the terms of the sub-contract and the plaintiffs made a call upon the guarantee by letter dated 19 March 2002. The defendant failed to respond and a second reminder and demand was sent to it on 25 March 2002. By a letter dated 22 March 2002, Miya's solicitor threatened legal action against the defendant should it honour the guarantee. On 16 April 2002 Miya obtained an interim injunction against the plaintiffs preventing them from making a call on the guarantee and on 25 April 2002, Miya commenced legal proceedings against the plaintiffs and the defendant. Miya's suit was eventually struck out on 29 October 2002. The plaintiffs sent the defendant a third and final demand on 31 October 2002 and despite requiring the defendant to release the monies under the guarantee to them by 4pm on 1 November 2002, the defendant only did so on 7 November 2002. The plaintiffs applied to the High Court, for *inter alia* a declaration that the defendant had wrongfully withheld payment on the bank guarantee and for general damages, exemplary damages and costs.

Held (allowing the plaintiffs' application in part):

[1] In the absence of fraud, a bank is obliged to pay on a bank guarantee promptly on demand. *China Airlines v. Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517 (FC) (folld); *Esal (Commodities) Ltd & Anor v. Oriental Credit Ltd & Anor* (CA) [1985] Llyod's Rep 546 (refd). On the facts, the defendant had wrongfully, though under unfortunate mitigating circumstances, withheld the payment of the guarantee when first demanded by the plaintiffs on 19 March 2002 and continued to do so until 16 April 2002 when Miya obtained the interim injunction thereby taking the matter entirely out of the hands of the defendant. The defendant had misapprehended their obligations under the said guarantee which resulted in the plaintiffs being deprived of their rights to prompt payment on the guarantee. (pp 565 h & 566 a)

[2] The plaintiffs should be allowed damages for 28 days, calculated from the date of the demand (19 March 2002) to the date of the interim injunction (16 April 2002). The High Court would have allowed the plaintiffs damages from the date of the demand (19 March 2002) to the date of payment (7 November 2002), *viz*, a period of seven months and 20 days, had it not been for the following mitigating circumstances: (a) the plaintiffs themselves were restrained, from 16 April 2002, under the interim injunction from making any calls or demands on the guarantee which resulted in the earlier demand being spent; (b) the defendant had not acted *mala fide* against the plaintiffs; and (c) the plaintiffs ought to have acted with greater alacrity in applying to lift the interim injunction. The defendant should not therefore be faulted for not releasing the monies in respect of the period after 16 April 2002. (p 566 b-f)

[3] The plaintiffs' contention that the defendant was unjustly enriched by way of fees and interests on the said guarantee by delaying payment on the guarantee was misconceived as it is an established principle of banking that bank guarantees attract no fees or interests. Although the defendant failed to honour their obligations under the guarantee, there was nothing in the circumstances of the case to suggest that the defendant's act was motivated by malice, insolence or arrogance or calculated to make a profit at the expense of the plaintiff. On the facts, the defendant's conduct was insufficient to warrant punishment by way of an award of exemplary damages to the plaintiffs. (pp 567 g & 568 a)

Case(s) referred to:

Bartlam v. Evans [1936] 1 KB 202 ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd [1996] 3 CLJ 163 FC ***(foll)***
Esal (Commodities) Ltd & Anor v. Oriental Credit Ltd & Anor [1985] Lloyd's Rep 546 ***(refd)***
LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***
RD Harbottle (Merchantile) Ltd v. National Westminster Bank [1977] 3 WLR 752 ***(refd)***
Rookes v. Barnard [1964] 1 All ER 367 ***(refd)***
UMW Toyota (M) Sdn Bhd v. Chow Weng Thiem [1996] 5 MLJ 678 ***(refd)***
United Commercial Bank v. Bank of India AIR [1981] SC 1426 ***(refd)***

For the plaintiffs - Devano Hasbi; M/s Tan Kim Soon & Co
For the defendant - Liew Pui Yee; M/s Iza Ng Yeoh & Kit

Reported by AC Simon

JUDGMENT

Vincent Ng J

Preamble

Enclosure 1 is the plaintiffs' application for *inter alia*, the following reliefs:

(1) a declaration that the defendant had wrongfully withheld payment of Bank Guarantee No: 2001/063 dated 16 May 2001 (the guarantee) despite plaintiffs' demand on 19 March 2002;

(2) general damages for their losses from 19 March 2002 to 7 November 2002;

(3) exemplary damages resulting from the defendant not honouring the plaintiffs' repeated demands for payment of the said guarantee; and

(4) costs on solicitor-client basis.

Background Facts

The essential facts of the dispute between the parties are as follows.

The plaintiffs formed a joint-venture to undertake works for a coal fired power plant at Manjung, Perak (the project). The plaintiffs appointed Miya Engineering (M) Sdn Bhd (Miya) as sub-contractor to carry out the external mechanical works for the project.

Under the terms of the sub-contract, Miya was required to furnish a bankers guarantee for the due performance of the subcontract. They did so, through the defendant, on 16 May 2001 for a sum not exceeding RM1,156,250 (exh. C encl. 2) (the guarantee).

Miya contravened the terms of the sub-contract and as a result, the plaintiffs made a call upon the guarantee on 19 March 2002 (exh. D encl. 2). The defendant was asked to release the monies under the guarantee not later than three days from the date of that letter. As the defendant failed to respond, the plaintiffs sent a second reminder and demand to the defendant on 25 March 2002 (exh. E encl. 2).

It would seem that in a letter dated 22 March 2002 addressed to the defendant (exh. CKM 1 encl. 5), Miya's solicitor had alleged that the plaintiffs' call on the guarantee was fraudulent and threatened legal recourse against the defendant, should they honour the guarantee.

Very shortly thereafter, on 25 April 2002, Miya commenced legal proceedings against the plaintiffs and the defendant; *vide* suit no: D6-24-70-02. On 16 April 2002, Miya secured an interim injunction against the plaintiffs, preventing them from making a call on the guarantee from the defendant. The plaintiffs eventually succeeded in striking out Miya's suit on 29 October 2002, thus ending the siege on the guarantee.

The plaintiffs sent a third and final demand on 31 October 2002 and despite requiring the defendant to release the monies under the guarantee to them by 4pm on 1 November 2002, the defendant only did so on 7 November 2002 (exh. J encl. 2).

Declaration

The defendant issued the guarantee on the following terms:

> **... we ... hereby irrevocably undertake to pay to you an amount ... notwithstanding any objection by the Sub-contractor (Miya) upon receipt by us of your first demand in writing.** (emphasis added).

The area of law concerning bank guarantees is well established; in the absence of fraud, the bank is obliged to pay on the guarantee promptly on demand.

I need look no further than the Federal Court case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) & Anor* [1996] 3 CLJ 163, wherein Mohamed Dzaidin FCJ (as he then was) cited with approval the judgment of Akner LJ in *Esal (Commodities) Ltd & Anor v. Oriental Credit Ltd & Anor* (CA) [1985] Lloyd's Rep 546 whereby his Lordship stated:

> ... the entire object of the transaction, namely **to enable the beneficiary to obtain prompt and certain payment** ... as to the general nature of performance bond, where it is stressed that a bank is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor the question whether the supplier is in default or not, **the only exception being where there is clear evidence of both fraud and of the bank's knowledge of that fraud**. (emphasis added).

The onus on the bank to honour a bank guarantee upon demand has been explained by Kerr J in *RD Harbottle (Merchantile) Ltd v. National Westminster Bank* [1977] 3 WLR 752 wherein he opined that:

> It is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by the banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The Courts are not concerned with their difficulties to enforce such claims; these are risks, which merchants take. In this case, the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of the bank are on a different level. They must be allowed to be honoured, free from interference from the Courts. Otherwise trust in international commerce could be irreparably damaged. (emphasis added).

(See *United Commercial Bank v. Bank of India* AIR [1981] SC 1426 and *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473.)

The principles of approbation and reprobation are set out lucidly in the dissenting judgment of Greer LJ in *Bartlam v. Evans* [1936] 1 KB 202 at 211:

> It was put by one of my brethren on the ground that a man is not entitled to reprobate that which he has already approbated. In my view, that principle has no application to this case, because it is based on this, that a man may not at one moment take an advantage of some agreement or some fact and at a later moment when it suits him reprobate that which he has approved. (emphasis added)

(See *UMW Toyota (M) Sdn Bhd v. Chow Weng Thiem* [1996] 5 MLJ 678.)

Guided by these principles, I hold that the defendant had wrongfully, though under unfortunate mitigating circumstances, withheld the payment of the guarantee when first demanded by the plaintiffs on 19 March 2002 and continued to do so until 16 April 2002, when Miya obtained the ad interim injunction thereby taking the matter entirely out of the hands of the defendant.

Nonetheless, the defendant ought not to be allowed to assert that for a period of 28 days they were caught between the devil and the deep blue sea, because they had misapprehended their obligations under the said guarantee, which resulted in the plaintiffs being deprived of their right to prompt payment on the guarantee. As such, I would hold that the plaintiffs should justly be compensated in general damages for the 28 days period. The plaintiffs prayed for damages of seven months 20 days for a period from 19 March 2002 (date of the letter of demand) to 7 November 2002 (date of payment), whereas, I was minded to allow damages for only 28 days from the said date of demand until 16 April 2002, when an ad interim injunction was ordered under Suit No. D6-24-70-2002. I would have granted them seven months 20 days on damages had it not been for considerations of the collective combination of the following mitigating circumstances pertinent to the issue:

(a) the plaintiffs themselves were, with effect from 16 April 2002, restrained under a peremptory court order (ad interim) of even date from making any calls or demands on the guarantee which resulted in the earlier demand being spent;

(b) the defendant had not acted *mala fide* against the plaintiffs considering the fact that they were placed in an invidious position when they received a letter dated 22 March 2002 from Messrs Tan Swee Im & Co, solicitors for Miya, alleging that there was 'a fraudulent call on the bond' by the plaintiffs (albeit, later proved to be totally unfounded) which directly led to their decision to submit to the jurisdiction of the court on the issue.

(c) since the plaintiffs rather than the defendant had contractual nexus with Miya, and was armed with exclusive privy to the facts between themselves and Miya, the plaintiffs ought to have acted with greater vigour and alacrity to secure the lifting of the ad interim injunction.

For these reasons I would thus hold that the defendant should not be faulted in not releasing the monies under the guarantee in respect of the period after 16 April 2002.

Exemplary Damages

It is trite law that an award for exemplary damages is only available in very limited circumstances. The clear authority for this is *Rookes v. Barnard* [1964] 1 All ER 367 at 410, wherein Lord Devlin identified the two categories of cases, established by common law, in which an award of exemplary damages could be awarded to serve a useful purpose in vindicating the strength of the law; namely, cases in which:

(i) there, is oppressive, arbitrary or unconstitutional action by the servants of the government; or

(ii) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff (the punishable behaviour).

Having identified the category of cases, his Lordship then went on to express the three considerations which should always be borne in mind when such awards are being considered. Lord Devlin held:

> First, **the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour.** The anomaly inherent in exemplary damages would become a absurdity if a plaintiff totally unaffected by some oppressive conduct ... obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes **a weapon that**, while it **can be used in defence of liberty**, ... can **also be used against liberty.** ... I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that **the weapon is used with restraint**. ... Thirdly, the means of the parties, ... are material in the assessment of exemplary damages. **Everything which aggravates or mitigates the defendant's conduct is relevant**. (emphasis added)

Bearing in mind these principles, I am seized with the duty to carefully examine the circumstances of the present case in considering the plaintiffs' claim for exemplary damages.

The plaintiffs' allegation that the defendant was unjustly enriched by way of fees and interests on the said guarantee by delaying the payment out of the guarantee is misconceived. It is a well established principle of banking that bank guarantees attract no fees or interests, on the simple premise that monies are not considered has have been advanced to the customer until the said guarantee is cashed.

It cannot be denied that the defendant failed to honour their obligations under the guarantee but I find nothing in the circumstances of the present case to suggest that their act was motivated by malice, insolence or arrogance or calculated to make a profit at the expense of the plaintiff.

The defendant was faced with the two options:

(i) withholding the monies from the plaintiffs and facing the "possible claim for damages and interests" mentioned in the plaintiffs' second demand (exh. E encl. 4) or

(ii) releasing the monies to the plaintiffs and facing the wrath of Miya for being "unconscionable and/or fraudulent" (exh. CKM 1 encl. 5).

Pressed for time, the defendant made a wrong choice. Unwise as the defendant's conduct seemed, it remains insufficient to warrant punishment by way of an award of exemplary damages to the plaintiffs.

Conclusion

For the aforesaid reasons, I:

(1) declare that the defendant had wrongfully withheld payment of Bank Guarantee No: 2001/063 dated 16 May 2001;

(2) allow the plaintiffs' claim for general damages for losses suffered from 19 March 2002, the date of the plaintiffs' first demand to 16 April 2002, the date of the interim injunction obtained by Miya;

(3) disallow the plaintiffs' claim for exemplary damages; and

(4) allow the plaintiffs' costs for the application only on party to party basis.